

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

<b>In the Matter of</b>	)	
	)	
	)	
<b>Inquiry Concerning the Deployment of</b>	)	
<b>Advanced Telecommunications Capability</b>	)	
<b>To All Americans in a Reasonable and</b>	)	
<b>Timely Fashion, and Possible Steps to</b>	)	
<b>Accelerate Such Deployment Pursuant</b>	)	
<b>To Section 706 of the</b>	)	<b>GN Docket No. 04-54</b>
<b>Telecommunications Act of 1996</b>	)	
	)	
	)	

**COMMENTS OF THE CITY OF WHITE PLAINS ON THE  
NOTICE OF INQUIRY AND THE FILED COMMENTS OF  
AT&T CORP.**

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**May 24, 2004**



## **SUMMARY**

**In page 17 of their filed comments in this Notice of Inquiry, AT&T Corp cites their experience with the City of White Plains as an example of the alleged abuse by municipalities of their monopoly control over public rights of way. Leaving aside the issues of whether a municipality has any right to protect the health, safety and welfare of its citizens in how the public right of way is being used and whether the taxpayers of a municipality are entitled to compensation from the use of their property by a third party (it is seeming unlikely to the City that AT&T would allow a municipality to use AT&T's property for municipal use for no compensation to it and its shareholders), the City of White Plains wishes to note that it objects to the characterization by AT&T Corp of the history between the two parties regarding negotiation of a franchise as one where the City of White Plains refused to agree to reasonable right of way regulations for a period of eight years.**

## **FIRST CONTACT**

**On January 6, 1992, a counsel for Teleport Communication ("Teleport") wrote to the Mayor of White Plains, the following letter:**

**" I am writing to you on behalf of Teleport Communications New York, a New York general partnership. We are a communications common carrier authorized to do intrastate services as a public utility by the New York Public Service Commission and authorized to provide interstate service by the Federal Communications Commission.**

**We are currently constructing an extension of our regional network to the City of White Plains. In this connection we are proposing to lease existing underground conduit and aerial poles from New York Telephone and Con Edison through your community. There is a possibility that we may need to construct a short conduit to connect a pole to manhole, pole to building and/or a manhole to building. We hereby request permission to place our fiber optic cable in your township.**

**Please execute this letter in the space below and return it to the undersigned. If you have any questions, please do not hesitate to contact me at 718-983-2114. Thank you very much for your assistance.”**

**Besides the fact that the Mayor would not have been authorized to sign the letter without the consent of the Common Council, the Common Council could not have authorized the request from Teleport Communications without approval of an appropriate agreement such as a franchise for the use of the public right of way. Under the New York State Constitution, Article VIII, §1 municipalities are prohibited from making gifts or loans to individuals or private corporations which has been interpreted to prevent municipalities from allowing the use of public property for less than fair and adequate consideration. In addition, the Charter of the City of White Plains (enacted by the New York State Legislature as Chapter 356 of the Laws of 1915, as amended) § 33 provides that “no franchise, lease or right to use the streets or the public places or property of the city shall be granted without fair compensation to the city therefor, and in addition to the other forms of compensation to be therein provided, the grantee shall be required to pay annually to the city such percentage of the gross receipts arising from the use of the franchise and of the plant used therewith as shall be fixed in the grant of said franchise.”**

### **SUBSEQUENT NEGOTIATIONS**

**From the City’s records, it is clear that the City commenced negotiations with Teleport by the following year. The City forwarded its signed agreement with Northeast Networks, Inc. and a proposed agreement between the City and the Metropolitan Fiber Systems of Westchester, Inc. to Teleport to serve as the starting point of negotiations. Soon thereafter, the aforementioned telecommunications providers complained that**

Teleport was soliciting business in the City. Counsel for Teleport, including the author of the January 6, 1992 letter, assured the City that Teleport had no facilities, no point of presence and no fiber optic network in the City.

Thereafter, the City discovered that Teleport had leased fiber optic cable from TCI Cable of Westchester, the cable television provider at the time in the City, to provide service in violation of the cable television franchise. Nevertheless negotiations went forward and Teleport's arrangement with TCI was terminated. At some point in 1994, it would appear that Teleport decided that it could provide service to its customers in the City utilizing NYNEX facilities exclusively. The record of contact between the parties disappears in the City files for approximately 2 years until June 1996 when the City was contacted by an outside attorney representing Teleport indicating that Teleport wished to pursue discussions regarding installation of facilities within the City rights-of-way.

Some discussions occurred between the parties from July 1996 through February 26, 1997 when Teleport requested permission to construct a short build in one location in the City although it indicated at some point in the future that it was likely that additional construction would be leased. Throughout 1997 discussions continued although City and Teleport representatives have different recollections concerning the urgency to complete the transaction.

#### **THE TELECOMMUNICATIONS ORDINANCE**

In December 1997, the City enacted its Telecommunications Ordinance, which provided for telecommunications providers to obtain either a franchise agreement or a

revocable license agreement. A franchise agreement permitted a provider to offer service anywhere in the City upon approval of the route by the Commissioner of Public Works subject to health and safety requirements. In general, a percentage of gross receipts franchise fee was requested for a franchise agreement as provided for in the City Charter.

A revocable license agreement provided permission to locate facilities only along a route approved by the Common Council and applied only to providers who did not offer telecommunications service in the City or who were installing less than 2,500 linear feet. A linear foot charge was requested for all such agreements in the City. The second portion of the ordinance was included in the ordinance specifically to apply to Teleport's small build so that they would only have to pay a linear foot charge for that small build.

#### **TELEPORT'S LATEST APPLICATIONS**

In April 1998, Teleport submitted an application for a revocable license agreement. Later in 1998, Teleport decided that a franchise agreement was preferable and requested a copy of the most recent franchise agreement entered into by the City with Metropolitan Fiber Network Services, Inc. Thereafter, on February 10, 1999, Teleport submitted an application for a franchise agreement. The application contained an assertion by a lawyer for Teleport, the author of the January 6, 1992 letter to the City, that certain modifications to the basic agreement had been agreed to by the Corporation Counsel. The Corporation Counsel believed that he had agreed to negotiate those matters but had not agreed to resolve them all in favor of Teleport's position.

**A subsequent request for information about corporate structure and services to be provided, material willing supplied expeditiously by other providers, was ignored while Teleport demanded a draft agreement with its name on the agreement. Without the information requested, a copy of the latest signed agreement, with only the name of the franchisee updated was forwarded to Teleport in May 1999. Teleport refused to provide certain information that it felt was irrelevant and refused to consider any financial guarantees by parent corporations of the obligations of Teleport as had been provided by Brooks Fiber Properties, Inc. for its subsidiary Brooks Fiber Communications of New York, Inc. After negotiating the proposed agreement for a little over a month, Teleport brought the proceeding upon which it eventually prevailed in federal court.**

**Subsequent to the institution of the proceeding, the City offered to make changes to the proposed agreement in line with proposals already proposed to certain other providers, Metricom, Inc. and Level 3 Communications, LLC which were ongoing during the litigation. In its August 1999 proposal, the City proposed to modify: the clause that provided that the franchisee would pay a 5% of gross revenue fee even if the clause was held by a court to be illegal, proposing instead a clause that would require a re-negotiation subsequent to a finding of invalidity; the provision requiring the provision of annual audited financial reports, proposing instead a clause that would require the provision of information necessary to demonstrate the continuing financial capability of the franchisee to comply with the agreement; and the clause requiring annual reports on various items, including descriptions of customers and classes of**

customers, proposing instead a clause which gave the City the discretion to require the submission of information it deems necessary or appropriate.

Teleport did not agree to make any no changes nor made any counter proposals. Through its attorney, the author of the January 6, 1992 letter, Teleport made clear that it would never supply financial records of any kind because AT&T, Teleport's parent, was incapable of ever supplying a false number to a regulatory body since its shareholders would never stand for such an action. Teleport maintained that no safeguards regarding financial reports for a company the size of AT&T was needed and to even request such assurances was insulting and demeaning. Despite its protestations, in light of Enron, Worldcom and Adelphia, it would appear that the desire of the City to have some ability to review financial records was not so unreasonable as Teleport imagined.

Before the eventual Second Circuit decision in this matter, The City of White Plains was able to negotiate franchise agreements with Northeast Networks, Inc., Metromedia Fiber Network Services, Inc., Brooks Fiber Communications of New York, Inc., Telergy Network Services, Inc., Adelphia Business Solutions Operations, Inc. and Consolidated Edison Communications, Inc. as well as revocable license agreements with Qwest Communications Corporation, Northeast Optic Network, Inc. and Level Three Communications, Inc. All of these providers were able to accept agreements similar the one proposed to Teleport. The City was willing to discuss changes between each agreement while keeping the agreements similar enough to provide equity among all the providers. It is respectfully submitted that if Teleport was truly desirous of negotiating an agreement one could have been reached prior to the litigation. It is also

respectfully submitted that Teleport was at least as responsible as the City for the delays in the negotiations, their protestations notwithstanding

### **CONCLUSION**

Municipalities have a duty to protect the health, safety and welfare of its citizens and the public fisc for use of public property. One should not assume without investigating all the facts that the failure to reach an agreement for a franchise agreement over a period of time should be deemed wholly the responsibility of a municipality.

Dated: May 24, 2004.

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